1957

State of Utah v. Chester Mathis : Brief of Appellant

Utah Supreme Court

D. H. Oliver; Attorney for Appellant;

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

STATE OF UTAH,

Respondent,

vs.

CHESTER MATHIS,

Appellant.

CASE NO. ~~8375~~ 8753

BRIEF OF APPELLANT

D. H. OLIVER
Attorney for Appellant
309 Frick Building
Salt Lake City, Utah

TABLE OF CONTENTS

ARGUMENTS

STATUTES CITED

CASES CITED

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

STATE OF UTAH,

Respondent,

vs.

CHESTER MATHIS,

Appellant.

No. 8375
CASE

BRIEF OF APPELLANT

STATEMENT

On June 18, 1957, appellant was convicted of a crime in the District Court of Salt Lake County and sentenced to a term in the State prison (R 93). From the verdict and judgment rendered thereon, appellant appeals to this court and assigns the following:

1. Error of the Court in granting the State a continuance without a showing as provided by law.

2. Error of the Court in over-ruling appellant's objection to the impanelling of the jury.

3. Error of the Court in over-ruling appellant's objection to the introduction of testimony.

4. Error of the Court in denying appellant's motion in arrest of judgment.

To sustain this appeal and reverse the judgment, the appellant relies on the folowing:

PROPOSITIONS OF LAW

I

DUE PROCESS OF LAW MEANS, THE PROCEDURE PROVIDED BY THE LEGISLATURE FOR THE TRIAL OF ACTIONS.

Henderson vs. State, 126 P. 840

II

WHEN A CRIMINAL ACTION IS CALLED FOR TRIAL IN UTAH, NO CONTINUANCE MAY BE HAD EXCEPT UPON A SHOWING OF GOOD CAUSE BY AFFIDAVIT.

Sections 11 and 12, Article I, Utah Constitution
Section 1, 14th Amendment, U.S. Constitution
Section 77-29-1 Utah Code, 1953
Section 77-24-18 Utah Code, 1953
State vs. Hartman, 119 P2 112
Finnely vs. State, 228 P 1003
State vs. Williams, 163 P 1104
In Re Begerow, 65 P 828
Arrowsmith vs. State, 175 SW 545
Logan vs. State, 234 SW 493
People vs. Buckley, 47 P 1009

III

A VOLUNTARY FISHING TRIP ON THE PART OF THE COMPLAINING WITNESS IN A CRIMINAL CASE IS NOT GOOD CAUSE FOR DELAYING THE TRIAL.

State vs. Fairclough, 44 P2 692
State vs. Taylor, 207 P 746
In Re: Begerow, 65 P. 828
Hernandez vs. State, 11 P2 356
Neven vs. Neven, 154 P 78
State vs. Keefe, 98 P 122
State vs. Freshwater, 85 P 447
State vs. Williams, 163 P 1104
State vs. Brewer, 158 P 1094
Arrowsmith vs. State, 175 SW 545
People vs. Flynn, 26 P 1114
Musgraves vs. State, 106 P 544

ARGUMENT

I

DUE PROCESS OF LAW MEANS, THE PROCEDURE PROVIDED BY THE LEGISLATURE FOR THE TRIAL OF ACTIONS.

In Henderson vs. State, due process is defined by the Oklahoma Supreme Court as follows:

> "In criminal cases in a State Court due process of law means a trial in a court of competent jurisdiction before an impartial judge and jury, or before a judge alone, upon an accusation, either by indictment or information, as the State may provide, charging the accused of the violation of some State law, of which accusation the accused must have notice in time to enable him to prepare for trial. The trial must proceed according to the established procedure or rules of practice in such State applicable to all such

cases."

To elaborate further upon this question would be a reflection upon the intelligence of this Court, so we proceed to a consideration of the main problems.

II

WHEN A CRIMINAL ACTION IS CALLED FOR TRIAL IN UTAH, NO CONTINUANCE MAY BE HAD EXCEPT UPON A SHOWING OF GOOD CAUSE BY AFFIDAVIT.

The substantive question presented by this appeal, is that appellant's conviction was obtained by violating his constitutional rights.

On May 17, 1957, appellant was duly arraigned on an information charging him with a crime, to which he entered his plea of not guilty, and trial was set for June 11th to follow in order (R 6). Thereafter on May 21, the Clerk of the Court set the trial for June 5th at 10 o'clock A.M. and notified the respective parties thereof, pursuant to the rules of the Court. On June 4th, a supeona was issued for State witnesses and the sheriff's return shows that this supeona was recalled (R 7).

On June 5th at 10 o'clock A.M., appellant appeared in Court with his counsel ready for trial, and the prosecuting attorney appeared and orally moved the court for a continuance stating that the complaining witness was in Yellowstone Park. No showing of any kind was made or offered by affidavit or otherwise, to which motion the appellant objected. The appellant's objection was over-ruled, and the state's motion for a continuance granted

(R 8).

On June 18, the case was again called for trial at which time the appellant objected to the impanelling of the jury, which objection was over-ruled by the Court (R 12).

After the jury had been impanneled, appellant objected to the taking of any testimony, which objection was over-ruled (R 14). At 4:25 P.M., that same day, the jury returned its verdict finding the appellant guilty (R 10).

On June 21st, appellant filed his motion in arrest of judgment (R 110), which motion was overruled, and appellant sentenced to a term in prision (R 111).

Article 1, section 11 of the Utah Constitution provides, in substance, that all Courts shall be open, and every person shall have remedy by due course of law, which shall be administered without denial or unnecesary delay, and section 12 provides, in substance, that persons accused of crimes shall have a speedy public trial.

In Arrowsmith vs. State, the Supreme Court of Tennessee said:

> "A speedy trial within the constitutional guarantee, means a trial as soon after indictment as the prosecution can with reasonable diligence prepare for it, without needless delay, having in view its regulations and conduct by fixed rules of law."

People vs. Buckley is a California case wherein it is said:

> "A speedy trial does not mean at once, but with all convenient dispatch, and implies courts in which a trial may be had. No doubt it also implies reasonable time for the state to provide courts and juries, and to procure witnesses. It imposes, however, a special duty upon the state with reference to such cases, and, if the duty is not performed, the prosecution should be dismissed . . . the mere statement of the judge that the court has been otherwise engaged does not show good cause."

The 14th Amendment prohibits any state from depriving any person of his liberty, except by the procedure provided by the legislature, or other law making body.

Pursuant to these constitutional provisions, the legislature enacted the code of criminal procedure, all of which was adhered to until June the 5th, at which time the State discovered that its main witness was absent. The legislature was wise enough to anticipate such situation and provide a remedy therefor, as follows:

Section 77-24-18 provides:

> "After his plea, the defendant shall be entitled to at least two days to prepare for trial, but the time of the trial shall not be postponed for a longer time than the court may deem imperative."

> "Section 77-29-1. When an action is called for trial, or at any time previous thereto,

the Court may upon sufficient cause shown by either party by affidavit, direct the trial be postponed to another day of the same or to the next term. But the Court shall not postpone the trial for a longer time than may be necessary."

In State vs. Hartman, this Court construed this section with the following language:

> "In the case at bar, no affidavit was made, oral statements were given in open court, and the Court ruled: When you seek a continuance because you haven't got a witness here, it is necessary that the court pass upon the materiality of the testimony. The testimony must be material, there must be some showing of that kind."

In People vs. Buckley it is said:

> "No diligence was shown to procure the attendance of the witness. Certainly the statement of the witness that it would be a hardship to require him to come from Sacramento was a poor excuse for continuing the case 33 days while the defendant was in jail . . . The benefit of this constitutional guarantee cannot be denied on such flimsy showing."

After reviewing constitutional and statutory provisions similar to ours, the Supreme Court of Oklahoma in Finnely vs. State, said:

> "A party charged with crime has the costitutional right to a speedy trial, and the Court has no discretionary power to deny him a right so important. It was enough for the defendant to show that the time fixed by the statute after information filed had expired, and that the cause

was not postponed on his application. If there was any cause for holding him for a longer time without trial, it was for the prosecution to show it."

In this case, the defendant filed a demand for trial on April the 3rd, requesting a trial at that term of Court, but it seemed that the court on its own motion refused the defendant's request and set the trial for the following term, and in discussing the constitutional requirements in criminal cases, the Court continued:

> "The State wholly failed to meet the requirements of a showing that a continuance was necesary. The burden, under the circumstances, was upon the State.
>
> "These constitutional and statutory rights are designed to prevent prosecutions and capricious delays in criminal trials, in which the accused, whether innocent or guilty, might be imprisoned or detained under bond indefinitely. On the other hand these provisions are not designed to hamper the State in the prosecution of criminal cases. Where no showing for delay is made by either party the presumption arises that the delay was necessary or that it was due to the desire of the accused. But where the accused insists and keeps insisting upon a speedy trial, without any showing made by the State justifying a delay, that presumption does not exist. The adoption of the contrary rule of judicial construction would render the statutes and constitutional provisions relative to a speedy trial nugatory."

In State vs. Williams, the defendant filed an affidavit in substance, that he was impecunious and that

he was unable to proceed to trial without certain witnesses named therein and the court held that such affidavit was not sufficient to meet the requirements of the statute, stating:

> "The defendant's Affidavit does not, in our opinion, appear to be of suficient merit to have justified the court in granting the motion."

In the case at bar, after the appellant's motion in arrest of judgment had been denied and after the defendant had been sentenced to a term in the State Prison, the District Attorney appeared in Court and attempted to justify the record by testifying in substance, that at the time he issued the subpeonas the complaining witness was in Yellowstone park and that by reason of her absences the State could not proceed. See (R 116).

It is the position of appellant that such showing came too late.

In Logan vs. State, it is said:

> "An affidavit for continuance is of no effect when filed after defendant has been tried and convicted."

We will discuss the sufficiency of this showing in the next proposition.

In discussing the meaning of the constitution and statutes similar to ours, the Supreme Court of California in, in re: Begerow, said:

> "It must be remembered that in construing our declaration of rights there is no presumption that the government or its officers will act justly, but the contrary. These sections imply

possible oppression, and are designed to enable the victim to assert his rights, even as against the government. The very first section in that chapter of our constitution asserts that the right of all men to enjoy and defend, life and liberty is inalienable. Then follow 12 sections, all calculated to secure to individuals this right, as against the government. To the same end, section 13 declares the right to a speedy, public trial. This certainly has no other function than to protect those accused of crime against possible delay, caused by wilfull oppression or neglect of the State or its officers. For, no doubt, persons apprehended upon suspicions have suffered long imprisonment merely because they were forgotten. The declaration of rights differs from the great English charter, in that it is not an assurance to the individual from a sovereign, but it is a command and limitation of power upon the State officials by the people who created the form of government. Either is a recognition of the fact, that the State cannot rightfully hold in prison even an accused person longer than is necessary that he may be tried, before trial and judgment rendered . . .

"It only remains to say that the Statute does not authorize the state or its officers to hold an accused person in imprisonment unnessarily, even for 60 days. As already stated, when the prosecution is begun, the state becomes a party litigant. And as such, must diligently prosecute its case. No unnecessary delay againt the will of the defendant is to be allowed to it. The defendant is discharged from custody."

III

A VOLUNTARY FISHING TRIP ON THE PART OF

THE COMPLAINING WITNESS IN A CRIMINAL CASE IS NOT GOOD CAUSE FOR DELAYING THE TRIAL.

It is the contention of the appellant that even had an affidavit been made as provided by statute, the facts as evidenced by the record would not constitute sufficient cause to justify a continuance.

In Hernandez vs. State, the trial court continued the trial over July and August stating as its reasons therefor the following:

> "There is now and has been for some 10 or 15 years a rule in this court that no jury trial shall be held during July and August and this Court was following the rule of the Court."

In reversing a conviction had at the trial, and ordering the defendant discharged, the Supreme Court of Arizona, said:

> "Obviously, the good cause shown was the custom of the Court not to hold jury trial during July and August. Does this satisfy the statute? The question of good cause has been before the courts of many of the states and the decisions are varying. We have found none nor have we been cited any that are strictly on all fours with the case at bar. We think, however, the principal applicable is well stated in the case of ex parte Caple 58 Miss. 558, as follows; a judge has no right upon such an issue to consult the desires or interests of particular classes of the community, so long as there remains one prisoner in custody who demands to be tried, not even to subordinate the right of the imprisoned to the mere wishes of the entire community. There must be some grave public ne-

cessity to warrant the prolongation in confinement of those who demand a speedy trial which the constitution guarantees the humblest citizen.

> "No rule or custom of court can set aside a positive statute, especially when it involves the protection of a constitutional right conferred upon the individual citizen."

Neven vs. Neven, is a Nevada case, wherein the defendant in a divorce action was also the guardian in a matter pending in another court. The trial in the action was a divorce proceeding pending in the District Court at Reno, and on the date set for the trial, the defendant's attorney made an application for a continuance based upon his affidavit stating that the deendant was in Elko, Nevada, looking after the guardianship of his ward in the courts up there, and also that a delay in train service made it impossible for him to reach court in Reno in time for trial, and in discussing the good cause necessary to sustain a continuance, the Supreme Court of Nevada, said:

> "A party who is a material witness in his own behalf must have his testimony ready for use at the trial unless prevented from doing so by some obstacle which by the exercise of reasonable diligence he cannot overcome, and the obstacle should not be one which he has created by his own voluntary act. If he allows consideration of business or pleasure or even regard his own health to call him away for a time when his suit is liable to be called for trial and thereby loses the benefit of his own testimony he must suffer the consequences. A party must be held to the exercise of good faith and diligence

and cannot be heard to complain if the failure to present his case results from an attempt to subordinate the business of the Court to his own business engagements and convenience."

In Taylor vs. State, the court granted the defendant one hour in which to prepare a formal application for a continuance, and the attorney failed to prepare such an affidavit on the ground that he had other business pending in another court at the time and was not able to prepare the necessary application within one hour, and the Oklahoma Court held that the business of the attorney in another court was not sufficient cause to grant a continuance.

During the trial of the cause at bar, on cross-examination of the prosecutrix, beginning at (R 56), the following took place:

Q. Where were you on June 5th?

A. That was the day we were in Yellowstone.

Q. When did you go to Yellowstone?

A. The previous Saturday.

Q. Did you advise the County Attorney or District Attorney that you were leaving town?

A. No sir, I did not.

Q. What was your purpose for going to Yellowstone?

A. Just to rest and relax and fish; Jim was going up there on business.

The Court: You have that as an objection to all of the evidence.

Mr. Oliver: Yes.

Mr. Ronow: What this Witness does or does not do has nothing to do with the setting of cases; I could not reach her with a supeona.

The Court: Over-ruled.

It is quite clear that had a showing been made by the prosecuting attorney on June 5th, that showing would have revealed what appears in this testimony, that the witness voluntarily left the State to go on a fishing trip to Yellowstone Park, and such a showing would not have been sufficient cause to justify a continuance under the law cited above.

State vs. Brewer is a Utah case, wherein the case was called for a trial on June 21st, at which time the defendant interposed a motion for a continuance supported by affidavit, claiming that a material witness lived outside the State and that he had used every possible means to secure the presences of said witness at the trial. The court over-ruled the defendant's motion and upon appeal this Court said:

"The record shows that the Court on May 1st, made an order setting the case for trial. No claim was made that defendant and his counsel were not advised of this order at the time it was made. The court over-ruled the motion for a continuance. On June 21st, the case was again called for trial and the defendant interposed another motion for a continuance, supported by affidavit in which he reiterated the facts set forth in the former affidavit. The Court over-

ruled the motion. This ruling is assigned as error. As stated, it is not claimed, and the record does not, show, that defendant used any diligence whatever to procure the attendance of the witness. Moreover, when the defendant was testifying in his own behalf, stated on cross-examination that he never wrote a letter to the witness; never received a letter from her; never sent a telegram to her; never received a telegram from her, as stated in his affidavit."

This case affirmatively holds that a showing of due diligence is required by affidavit before a continuance is justified under the statute above quoted.

In the case at bar (R 56) the record shows that the complaining witness left town for Yellowstone Park on the Saturday previous to June 5th, which was June the 1st. At (R 6) the record also shows that on May 17th, this cause was set for trial for June 11th in turn. Thereafter, and in conformity with the rules and general practice of the Court, the clerk set the case definitely for trial on June 5th, and notified the respective counsel thereof on May 21. This advised counsel of such setting at least 15 days prior to the time the trial was to begin, and notwithstanding this notice the record does not disclose, and the prosecuting attorney does not claim that he made any effort whatsoever to notify or otherwise inform the witnesses of this trial until June 4th, when a subpeona was issued. There was at least 10 days prior to June 1st, when this particular witness was in the jurisdiction of the court and subject to supeona and nowhere in the record is there any showing of any kind indicating any reason whatsoever for not notifying this

witness that trial was set for June 5th, and requiring her presence, and in this we respectfully submit that the State has wholly and completely failed to make any showing of diligence or otherwise to justify a continuance over the objection of the defendant, and certainly the statute does not vest in the Court any power of discretion or authority to continue a trial without the showing required by the statute.

Arrowsmith vs. State, is a Tennessee case wherein the defendant was charged on several indictments of several separate and distinct crimes and upon the conviction of one, the Court made the following order:

> "Came the attorney general for the state, and, it appearing to the court that defendant is serving a term in the penetentiary, it is considered by the court that said cases be retired from the docket until the expiration of said sentence."

In reversing a conviction on the second trial, the Tennessee Supreme Court, said:

> "The penetentiary is not a place of sanctuary, and an incarcerated convict ought not to enjoy the immunity from trial merely because he is undergoing punishment on some other judgment of guilt. Why should there be a delay in bringing him to trial on an indictment pending against him, a convict who has not yet completed the service of a previous sentence? No reason can be suggested for such delay in the case of a convict adjudged guilty of some other offense and actually in execution of a sentence thereunder that does not apply equally to an individual who has been indicted, but has not yet been tried."

State vs. Keefe, is a Wyoming case, wherein syllabus 10 reads as follows:

> "Under revised statute 1899, sections 5382 and 5383 requiring accused persons to be tried within specified times, accused imprisonment in the penitentiary for another offense does not excuse a delay in prosecution."

In State vs. Hartman, this Court held that the deendant had not shown diligence, and in State vs. Fairclough, that the absence of defendant's main attorney in the trial of another cause does not constitute good cause for delay.

In Musgraves vs. State, it is said:

> "No reason is given why process was not procured for the witness at an earlier date. The law requires diligence in these matters. A defendant cannot sit still and wait until just before his trial before he begins to get ready for trial. He must be diligent.

It just happens, in the case at bar, that the shoe is on the other foot.

Back in the territorial days of this state in the case of People vs. Flynn, this Court held that imprisonment is no excuse for delay of a trial in a criminal case.

CONCLUSION

We have shown, herein, the procedure provided by the legislature for the trial of criminal cases in Utah; we have shown wherein those rules were not followed or obeyed in the trial in this cause; we have shown that business of counsel in another court is not good cause for delaying a criminal trial; that imprisonment

of defendant is no good cause for delay; that negligence in securing witnesses is not good cause for delay, that the custom of the court in not trying cases in the summer time is not good cause for delay; and that the private business or pleasure of a party to the action is not good cause for delay. We have also shown wherein the State failed to make any showing whatsoever at the time it requested a continuance and that the showing attempted to be made after trial, conviction and sentence, was untimely and too late. Assuming for the sake of argument, that such showing was timely, we have shown wherein it does not measure up to the standards of diligence and good cause required by law, and in this we respectfully submit, that if the delay in the trial of this case can be justified by the urge of the prosecutrix to relax and fish, then the legislature acted in vain in enacting Sections 77-24-18 and 77-29-1 of the penal code; that all of the decisions of the Courts of Last Resort in construing similar statutes have been written for little purpose and both our State and Federal Constitutions have become as sounding brass and tinkling cymbals.

In this we respectfully submit that the conviction in this case should be reversed with directions to discharge the appellant and dismiss the information.

Respectfully submitted,

D. H. OLIVER
Attorney for Appellant
309 Frick Building
Salt Lake City, Utah